In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 330

ROBERT B. ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 318 Misc.

ROBERT GRENE, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the court of appeals on remand (Roberts Pet. App. F) is not yet reported. The opinion of the court of appeals on the original appeal is reported at 342 F. 2d 147 (C.A. 5), and the order of remand by this Court is reported at 383 U.S. 265,

275-523—67——1

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1967. Petitions for rehearing were denied on June 5, 1967. Petitions for writs of certiorari were filed on July 5, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Both petitioners present the following question:

1. Whether, in light of the evidence and the instructions, they were properly convicted on substantive counts of the indictment.

Petitioners Roberts (No. 330) presents the following question:

2. Whether a defendant is automatically entitled to a new trial where it is shown that agents of the F.B.I. illegally monitored telephone conversations between a co-defendant and an attorney.

Petitioner Grene (No. 318 Misc.) presents the following question:

3. Whether the district court abused its discretion in denying a continuance.

STATEMENT

Petitioners Roberts and Grene, together with other defendants, were convicted in the United States District Court for the Southern District of Florida on [illegible] counts of an indictment charging securities and [illegible] fraud in violation of 15 U.S.C. 77q(a) and 18 [illegible], and a conspiracy to commit the substantive [illegible] in connection with the operations of the Crown Finance Corporation. Roberts was sentenced to

imprisonment for one year on each of the counts, the terms to run consecutively. Grene was sentenced to imprisonment for eighteen months on each of the counts, the terms to run consecutively.[1]

The court of appeals affirmed the conviction on all ten counts against Grene. The court reversed the conviction of Roberts on six counts, and affirmed as to four (Counts 3, 6, 8, and 10). *Gradsky* v. *United States*, 342 F. 2d 147 (C.A. 5).[2] On petitions for writs of certiorari, this Court granted the writs "* * * limited to the issue whether petitioners were improperly convicted of substantive offenses committed by members of the conspiracy before petitioners had joined the conspiracy or after they had withdrawn from it." In all other respects the petitions were denied. *Levine* v. *United States*, 383 U.S. 265, 266. In accord with a concession of the Solicitor General, this Court held that a defendant could not be convicted of a substantive offense committed by a member of the conspiracy before he had joined the conspiracy, or after he had withdrawn from it, and remanded the case to the court of appeals "with instructions to reverse the convictions the Solicitor General concedes must be reversed," and to determine, in light of the concession, the evidence, the instructions to the jury, and the applicable principles of law, whether in addition to the relief conceded by the Solicitor Gen-

[1] Grene suggests (Grene Pet. 5) that he was not sentenced on Count 10. The judgment of conviction, however, clearly shows that he was sentenced to imprisonment for eighteen months on all counts, including Count 10 (R. 216).

[2] The Solicitor General conceded that as against Grene, the convictions on Counts 1 and 7 should be reversed.

eral petitioners are entitled to further relief regarding the convictions for the substantive offenses." *Levine* v. *United States*, *supra* at 267.

On remand, the court of appeals, in accord with the instructions, reversed the convictions against Grene on Counts 1 and 7, and affirmed on all the other counts. The conviction of Roberts on Counts 3, 6, 8 and 10 was again affirmed (Pet. App. F).

ARGUMENT

1. Both petitioners again challenge the sufficiency of the evidence supporting the convictions on the substantive counts.

(a) Roberts concedes that all of the substantive offenses of which he was convicted were committed by members of the conspiracy while he was a member of that conspiracy, but argues (Pet. 13–21) that the jury was not required to determine whether those offenses were committed in furtherance of the conspiracy. This argument was fully made in his prior petition for a writ of certiorari and reply brief (No. 125 O.T. 1965), and consideration thereof was declined by this Court. In any event, the claim is without merit. The trial court charged, *inter alia* (R. 4312–4313):

> Now as I have said in a conspiracy all conspirators are responsible for everything that the other conspirators said or did, and * * * someone who is in a conspiracy he may not know who the conspirators are all of them. It is enough for him to know there is a conspiracy, and he is not responsible * * * I mean he * * * may not know what they have done, but he is responsible for everything they do, both before and after-

> wards, so if your inquiry should determine whether there was two or more persons, and then if you find that two or more persons did devise a scheme to defraud, then you will find that there was a conspiracy, and then the law of conspiracy would apply, so each one is responsible.
>
> It is kind of a partnership in crime.
>
> And as you know in partnerships each partner is responsible for what the other one does or what he says.

These instructions properly advised the jury that each member of the conspiracy could be convicted of substantive offenses committed by other members of the conspiracy while he was a member of such conspiracy. Although it is true, as petitioner suggests, that these instructions did not precisely state that such criminal responsibility was dependent upon a showing that the substantive offenses were in fact committed in furtherance of the conspiracy, such was the clear implication. Moreover, the court instructed the jury that they could convict only if they found that the use of the mails was in furtherance of the overall fraud (R. 4308). There was thus no error in reaffirming Roberts' conviction of Counts 3, 6, and 8 on remand.[8] *Pinkerton* v. *United States*, 328 U.S. 640.

(b) Grene apparently contends (Grene Pet. 12–15) that the evidence was insufficient to establish his membership in the conspiracy on January 21 and 25, 1960, when two of the substantive crimes (Counts 8 and 6 respectively) were committed in furtherance

[8] Roberts does not challenge the conviction on the conspiracy count—Count 10.

of that conspiracy. As we pointed out in our prior Supplemental Memorandum for the United States (Nos. 112, 125, 230 and 235, O.T. 1965, pp. 8–9), the evidence shows active participation in the conspiracy by Grene beginning some time "prior to" February 1960. A witness who sold realty to both C.F.C. (the corporate body involved in the fraudulent scheme) and Credit Realty, a related company, testified that he met with Grene "prior to" February 1960 regarding the sale in question (R. 3276). On February 20, 1960, that witness again met with Grene and two co-defendants (Gradsky and Glaser) in connection with the same sale (R. 3276–3278). The property involved was then divided into two equal sections, one going to C.F.C. and the other to Credit Realty (R. 3281–3282, 3286–3287). On March 20, 1960, Grene signed as a witness various instruments transferring property between C.F.C. and its related company, Credit Realty (R. 3315–3316, 3319–3321). In April 1960, when Gradsky resigned as president of C.F.C., Grene became president and chairman of the board (R. 946, 1394, 1692–1698, 1708, 2257, 3054–3060, 3458, 3633). Thereafter, Grene served as Gradsky's alter ego, and Gradsky retained control of C.F.C. through this subterfuge and Grene's cooperation in it (R. 1692–1698, 3458, 3633). From all of these attendant circumstances the inference could reasonably be drawn that Grene's participation in the conspiracy began at least as early as January 21, 1960.

2. After oral argument on remand, the United States filed with the court of appeals a memorandum in which it disclosed that the Federal Bureau of Inves-

tigation had, in the course of an investigation of an establishment owned by an acquaintance of [illegible] Levine, monitored a conversation between co-defendant George Levine and his counsel after the indictment had been returned (Pet. App. A). On the authority of *Black* v. *United States*, 385 U.S. 26, the court of appeals ordered a new trial for Levine. After the government's memorandum had been filed, petitioner Roberts filed a motion with the court of appeals in which, although recognizing "that this error as to appellant Levine does not necessarily require that his [Roberts'] conviction be set aside," he moved for a new trial, or in the alternative, for a remand of the cause to the district court for an evidentiary hearing to determine whether or not he was prejudiced by the monitoring of Levine's conversation (Pet. App. B). The court of appeals denied the motion for a new trial "without prejudice to such application by him to the District Court as may be appropriate" (Pet. App. C). It denied a similar motion to reconsider (Pet. App. D).

Relying upon *O'Brien* v. *United States*, 386 U.S. 345, Roberts contends that it was error for the court of appeals to deny his alternative motion for a new trial. In *O'Brien*, this Court ordered a new trial for petitioner O'Brien because of the overhearing of certain conversations between O'Brien and his attorney, and granted the same relief as to copetitioner Thomas Parisi, who had not been overheard. However, in that case, the Solicitor General did not oppose like disposition as to both O'Brien and Parisi although he took that position in the belief that both men were entitled to a

[illegible]

remand for a hearing and not a new trial (see Brief for the United States, *Charles Joseph O'Brien and Thomas Parisi* v. *United States*, No. 823, O.T. 1966, p. 12). As was stated in the memorandum of disclosure, and as the court of appeals ruled, Roberts is free to take such action as he deems appropriate in the district court, at which time the relevant portions of the F.B.I. logs pertaining to the monitored conversations will be disclosed to him under appropriate protective orders. Upon a proper application in the district court that court will be in a position to determine what relief, if any, is appropriate.

3. Grene also contends that the district court abused its discretion in denying a motion for a continuance because, although his court-appointed counsel was competent, he had insufficient time in which to prepare for trial. This argument was rejected on the original appeal (342 F. 2d 147), and further consideration was declined by this Court. The issue was not within the purview of the remand by this Court, and the court of appeals properly declined further consideration.

For the reasons stated above, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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SEPTEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

ROBERTS *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 339. Decided October 16, 1967.

PER CURIAM.

The petition for certiorari is granted. Petitioner's conviction is vacated and the case is remanded to the District Court for further proceedings consistent with this opinion.

In proceedings before the Court of Appeals pursuant to our previous remand, *Levine* v. *United States*, 383 U. S. 265, the Court of Appeals granted petitioner's co-defendant Levine a new trial based upon a disclosure by the Government that, after the return of the indictment, agents of the Federal Bureau of Investigation monitored conversations between Levine and Levine's attorney. But the Court of Appeals denied petitioner's motion for the same relief or, alternatively, for a remand to the District Court for an evidentiary hearing to determine whether he was prejudiced by the monitoring; the Court of Appeals stated, however, that the motion was denied "without prejudice to such application by him to the District Court as may be appropriate." In the circumstances of this case, and in light of the acknowledgment of the Solicitor General in his brief in opposition that "the F. B. I. logs pertaining to the monitored conversations" are available, we think the Court of Appeals erred in denying petitioner's alternative motion for an evidentiary hearing in the District Court. We therefore vacate petitioner's conviction and remand to the

District Court with direction to afford petitioner such an evidentiary hearing. Depending upon its findings, the District Court will either reinstate the conviction or order a new trial, as may be appropriate. See *Wade* v. *United States*, 388 U. S. 218, 242.

Vacated and remanded.

MR. JUSTICE BLACK dissents.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.